United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

B
P/S

74-1138

To be Argued by
JOHN F. MARTIN
LOUIS F. MASCARO
MICHAEL P. DIRENZO

IN THE

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

THOMAS JOSEPH CARRALL, VINCENT McCLOSKEY and WILLIAM McCLOSKEY,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 74-1138, 74-1139, 74-1197

UNITED STATES OF AMERICA,

Appellee,

-v.-

THOMAS JOSEPH CARROLL, VINCENT McCLOSKEY and WILLIAM McCLOSKEY,

Defendants-Appellants.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS THOMAS JOSEPH CARROLL, VINCENT McCLOSKEY and WILLIAM McCLOSKEY

STATEMENT OF FACTS

The Statement of Facts, as enunciated in the Government's Brief, are not supported by the evidence. Illustrative of the general carelessness with facts and conclusions advocated by the Government are the following:

Page Three

a/ Boyd is alleged to be a potential gunman, but there is no evidence of this in the record.

b/ Subsequent meetings preparing for a mail truck robbery are alleged, but there is no evidence of any preparation at any subsequent meetings at which William McCloskey was present.

Page Five

c/ A claim that Carroll had a station wagon which would be used to stop the mail truck on March 27 and March 28, and that this station wagon was rented from Econo Car by Eileen Holder at the request of Vincent McCloskey, her boyfriend.

There is no evidence that Eileen Holder was Vincent McCloskey's girlfriend, that she rented the car at his request or that this station wagon was, in fact, the station wagon left in Pennsylvania and, in fact, the evidence indicates that the station wagon, whoever allegedly stole it, was not taken until March 30th and was not reported stolen until April 3rd.

Page Six

a/ The Government claims a meeting on April 5, 1973 with all of the defendants including Myers. The evidence from Myers and from the others was, in fact, that Myers was not at Katz' Delicatessen April 5, 1973, but was someplace else with someone else whose name and whereabouts could not be ascertained by defendants by direct ruling of the Court, as pointed out in Defendants-Appellants Brief.

Page Seven

e/ Carroll, Vincent McCloskey and Turner are alleged in the footnote to have stolen the van on March 29, 1973. This is clearly in error. There was no evidence to sustain a finding that any van was stolen on March 29 and even the van on which testimony was introduced as having been stolen from a company other than Econo Car, was not stolen or removed from the owners until at the earliest March 30, 1973 and possibly as late as April 2, 1973.

POINT I

On Page 9, the Government claims that the Court did not actually rule on Defendant's request to give a lesser included offense charge and, that even if it did, such denial would have been correct. The Court, in fact, specifically denied defendant's

request to charge lesser included offenses (Line 7 - Page 2019). This was error. The lesser included offense of Murder Second and Manslaughter should have been charged.

The Government quotes FULLER v. UNITED STATES. The FULLER case deals with 22 D.C. Code, Section 2401 through 22 D.C. Code 2403. The wording and intent of the statutes are totally different than Sections 1111 and 1114 with which the defendants were charged in Count 2 of the Indictment. In the FULLER case, the Court charged First Degree Murder, Second Degree Murder and Manslaughter. FULLER v. UNITED STATES indicates that Murder Second and Manslaughter are proper lesser included offenses and cites LEE v. UNITED STATES and other cases in support of that proposition. In the instant case, the only credible evidence established that no one intended to kill Hickey and that the shooting by Myers was accidental. (984, 988, 990, 1154, 1537 and 1538).

Obviously, in the instant case, the element of malice aforethought is for the jury to determine. The court instructed the jury that they may find malice and conversely, that they could also not find malice, in which case the lesser charges of Murder in the Second Degree and Manslaughter were required in order to prevent the jury from being forced to choose between outright acquittal and Murder in the first degree.

In UNITED STATES v. MARCEY, as cited by the Government on Page 9, the Court on Page 285, clearly states:

> "Since every legally unjustifiable assault with a dangerous weapon producing death is either murder or manslaughter, appellant was guilty of one or the other or else was not guilty at all".

The Government, starting on Page 9, argues that malice aforethought is, by definition, an element of Murder First or Second Degree under the statute and had there been a failure of proof on this element, it would have acquitted the defendants of any murder charge. This is not so. The error committed by the Court was in not permitting the jury to possibly find from the evidence Murder in the Second Degree or Manslaughter. If the act of killing is done unlawfully and with malice aforethought or without the premeditated intent wilfully to take a human life, then the offense, as argued with the appropriate authorities on Page 16 of Defendants-Appellants' Brief, is Murder in the Second Degree.

The credible testimony established that the shooting was accidental.

The Government on a footnote on Page 2, states that Mann, Myers and Crawford pleaded guilty to Second Degree Murder, a lesser included offense in Count 2. It states that Turner pleaded guilty to assaulting a person in lawful custody of mail with intent to steal the mail, a lesser included offense in Count 3. At best its position is schizophrenic.

POINT II of Defendants-Appellants' Brief, clearly established that the evidence refuted the charge in Count 3 that Crawford Lawrence was wounded with a .32 calibre weapon. The lesser included offense pleaded to by Turner was more consistent with the evidence and should have been included by the Court as an inferior crime which might be found by the jury.

While the PINKERTON case holds that a conspirator can be convicted of a substantative count in an Indictment resulting as a successful commission of the conspiracy, it does not permit the Court to change the elements of the substantative count.

In this case, the Court in its alternate theory charge for Count 2, as pointed out in Defendants-Appellants' Brief on Page 12, omitted the element of malice aforethought and omitted the requirement that the party killed was engaged in his Post Office employment and omitted the element that an attempted robbery occurred. The alternate charge, as given to the jury by the Court, did not spell out the elements of the substantative count under Sections 1111, 1114 and 2. It permitted the jury to find the defendants guilty of First Degree Murder by merely finding them: (a) guilty of the conspiracy; (b) that the killing was committed by another member of the conspiracy, and (c) that such act was one which the defendants might have reasonably foreseen might occur.

It is submitted that the charging judge must give all of the requisite elements of a substantative charge to the jury in order for it to convict under the Pinkerton theory. It is not permissable for the Court, as was done in this case, to tell the jury that once having found the defendants conspirators, that it could find them guilty of any act committed by a co-conspirator. The only substantative act of which a conspirator could be found liable, is a violation of a statute containing the elements legislated by Congress into such statute, as constituting a crime against the United States.

The Judge's alternate charge on Count 3 was likewise in error. Nowhere did this alternate theory spell out the requirement for the jury to find the defendants guilty of the elements of the substantative crime as well as guilty under the conspiracy count.

The Court's error was in failing to make the jury aware of the elements of the substantative counts as part of the alternate theory.

The witnesses, Johnson, Vasquez and Dalia were either defendants or potential co-defendants and it is naive to assume that the Government did not have more say, power and control of these witnesses than did the defendants.

The Government, on Page 14, claims that premeditation is not an element of First Degree Murder if the killing is committed in the perpetration or the attempted perpetration of a robbery. The cases cited by Defendants-Appellants in their Brief on Page 16, hold otherwise.

At best, the Court's charge on the testimony of accomplices and other requests listed on Page 22 of Defendants-Appellant's Brief, were skimpy and were pro-prosecution.

POINT II

The DEATON case dealt with similar transactions and on Page 117 states that the trial judge is required, as with any potentially prejudicial evidence, to balance all the relevant factors to determine whether the probative value of the evidence of other crimes is outweighed by its prejudicial character.

In this case, there is no doubt the overwhelming evidence at trial, day after day, was to outside acts which the Government

claimed was part of the conspiracy Count 1 of the Indictment. Even if this could be justified, and it certainly cannot because the Government granted immunity for testifying to the co-defendants when they had previously promised to testify as to the Counts in the Indictment in consideration for their pleas, the testimony was given and used to prove the malice required under Count 2 of the Indictment, the capital offense of Murder in the First Degree. The time spent on such testimony, the number of witnesses testifying on such testimony regarding the three outside crimes, was inherently disproportionate to the other testimony and evidence given on the trial in conjunction with the substantative counts of the Indictment.

POINT III

The Government quotes UNITED STATES v. ROSENTHAL as a proposition to support the Court's refusal to grant McCloskey's request for a continuance or a severance on the motion made December 5, 1973, five (5) days before trial.

ROSENTHAL made a motion for continuance four days before trial and for leave to retain other counsel. The motion was denied with leave to the defendant to proceed pro se in accordance with his alternate motion and the Court assigned to him as an attorney to sit at the counsel table, the attorney who represented him at the first trial. In this case, the Court played musical chairs with defendant's counsel. Defendant's new counsel was in the case less than one week before trial and was unable to properly prepare for trial. This was brought about, not by the defendant, but by the Court summarily dismissing counsel of de-

fendant's choice; that is Goldberg, after earlier having permitted counsel of defendant's choice, Hopper, to remove himself, all without defendant's consent or permission.

The delay occasioned on September 17, 1973 was not caused by the defendant, Vincent McCloskey, but instead was caused by the Court's difficulty over wiretaps. The question posed was not the inadequacy of counsel, as indicated by the Government on Page 21, but a lack of opportunity to properly prepare the case and a lack of counsel of defendant's own choosing, to whom defendant had paid $20,000.00 prior to the Court's unilateral releasing of defense counsel without defendant's consent.

POINT IV

The Government's position regarding the alleged oral admission by Vincent McCloskey is totally and absolutely wrong, as indicated in the record as set forth in Defendants-Appellant's Brief (pages 45/46).

POINT V

The Government's contention that there was sufficient evidence to support the conviction of William McCloskey is erroneous. Nowhere in the record is there any indication that William McCloskey had knowledge of the elements set forth in Count 1 of the Indictment. The evidence, even in the best light to the Government, does not make him a conspirator and he could very well have been innocently in the company of other individuals.

POINT VII

The Government's position that the Court did not err on cross examination and its handling of the trial, is at best, a blase effort to whistle while passing the graveyard. The Government's

contention that all of the multiple errors committed by the Court, as set forth in Point V of Defendants-Appellant's Brief, Pages 48 through 64, are harmless and do not deprive the defendants of their constitutional rights, is totally inconsistent with the record. While one or two errors might be condoned and considered minor and not requiring a reversal, the very scope, mass, depth and impact of the errors committed by the Court, as illustrated in POINT V, precluded the defendants from a fair trial. The Court's whole attitude was that the trial was just another administrative proceeding on the road between arrest and incarceration.

POINT VIII

The Court should have adjourned the sentencing of Carroll until his attorney was available to press legal arguments and address the Court at the sentencing.

POINT IX

The granting of immunity, as done in this case and the manner in which the procedure was conducted, is unconstitutional and deprived the defendants of due process.

The Government cites HOROWITZ and KILGO as authority that the procedure of the trial court was constitutional and proper.

The KILGO case dealt with the grant of immunity before a Grand Jury and in no way dealt with the rights of a defendant on trial. While the Government has a stake in investigations and Grand Jury proceedings, the Government's position cannot be used to deprive the defendants of a fair trial as was done in the instant case. The HOROWITZ case deals with a motion to squash a Grand Jury Subpoena and has no bearing on the point raised by the Defendants-Appellants.

POINT X

The Court should have declared a mistrial when William McCloskey's personnel file with the Post Office was brought to the attention of the jury. More so, in view of the fact that the evidence against William McCloskey was so weak as to be miniscule. The Court's instruction certainly did not overcome the impact on the jury tying William McCloskey directly to the Post Office when, in fact, it had no bearing on the case.

Mr. Hopper made no motions on behalf of William McCloskey toward the Indictment and any motions made by him to Indictment No. 606, were made on behalf of Vincent McCloskey.

POINT XI

THESE PROCEEDINGS RESULTED IN A GRAVE MISCARRIAGE OF JUSTICE

The defendants, Vincent McCloskey, Thomas Carroll and William McCloskey are now serving mandatory life sentences and are not eligible for parole for some fifteen (15) years.

Nowhere in the evidence is there any proof indicating that any of the three Defendants-Appellants carried a gun or made any overt move to hurt anyone during the course of the events alleged to have transpired herein.

The defendants, Mann and Myers were each sentenced to twenty-five (25) years and are eligible for parole in approximately 8-1/3 years. Myers fired a gun which killed Hickey and wounded Lawrence. Mann fired a gun in a busy intersection of Manhattan at Crawford Lawrence. John Turner, another defendant, was sentenced to ten (10) years and he admitted having a gun at the time of the incidents set forth in the Indictment. He is eligible for parole in 3-1/2 years.

The Government's position is that Defendants-Appellants were afforded a fair trial.

Justice, equity, common sense and even the law, cry that it is unfair and unreal for an admitted killer and an admitted shooter, toting guns, to be able to theoretically walk out of jail in 8-1/3 years, while others inculpated as a result of the actions of the gun wielders, are incarcerated for at least fifteen (15) years.

CONCLUSION

The judgment of conviction should be reversed and the Indictment dismissed, or, in the alternative, a new trial should be ordered.

Respectfully submitted

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Service of three (3) copies of the within
Brief is hereby admitted
this 15th day of July, 1974

Attorney(s) for appella

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